

**03-1039 BROWN V. PAYTON**

DECISION BELOW: 346 F3d 1204

LOWER COURT CASE NUMBER: 00-99000, 00-99003

**QUESTION PRESENTED:**

In *Boyde v. California*, 494 U.S. 370 (1990), this Court upheld the constitutionality of California's "catch-all" mitigation instruction in capital cases, which directs a jury to consider "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." The mitigating evidence at issue in *Boyde* was pre-crime evidence in mitigation. Relying on *Boyde*, the California Supreme Court held that California's "catch-all" mitigation instruction in this capital case is constitutional as applied to post-crime evidence in mitigation. In a 6-5 decision, the en banc Ninth Circuit held that the California Supreme Court decision was objectively unreasonable "because *Boyde* does not control this case." The question presented is:

Did the Ninth Circuit violate 28 U.S.C. § 2254 (d) when it found the California Supreme Court objectively unreasonable in holding that California's "catch-all" mitigation instruction in capital cases is constitutional as applied to post-crime evidence in mitigation?

**CERT. GRANTED 5/24/2004**